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Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

SUPPLEMENTAL BRIEF OF APPELLANTS.

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v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

SUPPLEMENTAL BRIEF OF APPELLANTS.

ARGUMENT.

A. Congress Has Found That Solid and Liquid Waste Can Be Disposed of in Sanitary Landfills Without Posing a Danger to Public Health or to Environmental Quality.

On October 21, 1976, the President signed the Resource Conservation and Recovery Act of 1976, Pub. Law

94-580, 42 *U. S. C.* § 6901 *et seq.* Said Act contains a positive Congressional recognition that solid waste is in interstate commerce,[1] 42 *U. S. C.* § 6943(2), and can be disposed of upon land without posing a danger to either public health or environmental quality, 42 *U. S. C.* §§ 6902(3), 6944 and 6945.

The Administrator of the United States Environmental Protection Agency is directed to establish criteria for determining which facilities may be classified as sanitary landfills, and which will be classified as open dumps. The criteria must, at a minimum, eliminate any reasonable chance of adverse effects on health or the environment from land disposal:

> "Not later than one year after the date of enactment of this section, . . . the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps. . . . At a minimum, such criteria shall provide that *a facility may be classified as a sanitary landfill* and not an open dump *only if there is no reasonable probability of adverse effects on health or the environment from disposal* of solid waste at such facility."
>
> 42 *U. S. C.* § 6944 (Emphasis added).

1. The House Report observes:

". . . it is clear that most of our discarded materials have at some time entered the flow of interstate commerce (if not as waste itself, then in the form of products which will at some future time constitute waste).

"The fact that waste itself is in interstate and intermunicipal commerce has raised a number of problems. (Generally, hazardous waste is more likely to be the subject of interstate transportation than is non-hazardous industrial or municipal waste)."

House Report No. 94-1491 accompanying H. R. 14496 (Comm. on Interstate and Foreign Commerce), at 9-10.

Sanitary landfills are not treated as a mere alternative to other forms of disposal; they are viewed as the principal disposal source. In describing the most effective approach for dealing with discarded materials, the Committee on Interstate and Foreign Commerce, United States House of Representatives, commented:

> "The Committee recognizes that the most effective approach for alleviating the problems created by discarded materials is a comprehensive discarded materials management approach. Such an approach includes the use of techniques to recover the greatest amount of energy and materials possible from the discarded materials, reduce waste residuals to a minimum, and *provide for an environmentally sound disposal of the remainder, principally through sanitary landfill.*" [2]

Congress was familiar with the problems typically associated with land disposal. It recognized that the improper disposal of wastes may present a danger to public health and environmental quality, 42 *U. S. C.* § 6901 (b)(2), but it also understood that "the effects on human health and the environment from real sanitary landfill should be slight"; [3] a conclusion also reached by the New Jersey Department of Environmental Protection (A109, 155, 158).

Curiously, on October 7, 1976, just two weeks before the President signed the Resource Recovery and Conservation Act of 1976, the Governor of New Jersey approved a supplement to the Solid Waste Management Act governing hazardous and chemical wastes, bulk liquids and pesticides, *P. L.* 1976, *c.* 99. Pursuant to Sec-

2. Id., at 32 (Emphasis added).

3. Id., at 37

tion 5 of said Act, after March 15, 1980, a solid waste facility may accept or receive for disposal hazardous waste, chemical waste, bulk liquid or pesticide if ". . . such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environmental protection] for the entire system". This represents an implicit legislative acknowledgment that properly regulated disposal does not pose a material threat to health or to the environment.

Appellees' attempted characterization of sanitary landfills as inherently or unavoidably dangerous to public health or the environment not only conflicts with the findings of state and federal government and with the record in this case, but also grossly distorts the true relationship between sanitary landfills and the environment.

Both within the industry and the government agencies charged with responsibility for solid waste programs, the environmental soundness of sanitary landfill disposal is an accepted fact. In a 1973 position paper on sanitary landfills, the U. S. Environmental Protection Agency's Office of Solid Waste Management Programs succinctly stated that "the sanitary landfilling process is the most economically feasible, acceptable method of solid waste disposal . . . . Under proper operation, *a sanitary landfill is aesthetically acceptable and free from public health and safety hazards.*"[4] This position has repeatedly been espoused by the EPA, and is expressly adopted in the EPA's 1974 Guidelines on Thermal Processing and Land Disposal of Solid Waste, wherein it is stated that "Sanitary landfilling is the most widely applied *environmentally*

4. *EPA Position Paper on Sanitary Landfills,* at 1, Office of Solid Waste Management Progams, U. S. Environmental Protection Agency (April 1973).

acceptable land disposal method."[5] And, in a publication released in 1976, the EPA's Solid Waste Management Programs Office once again acknowledged that "every community needs access to a sanitary landfill for environmentally safe disposal of its solid wastes."[6]

The EPA's official recognition of the environmental soundness of properly operated sanitary landfills accurately reflects the current thinking of knowledgeable observers of the solid waste industry. As one commentator has stated:

> "[T]hroughout this country, sanitary landfills will be *the* major mode of acceptable disposal for our commercial, industrial, chemical, waste water, and pollution control wastes, as well as resources recovery and energy conversion residues . . . . [R]esponsible disposal to land [is] the only potentially safe sink remaining for the disposal of our otherwise unrecovered residues."[7]

The aforementioned references are intended only to represent a small sampling of the exhaustive government and private literature pointing out the environmental compatibility of sanitary landfills.[8] What this sampling amply

5. *Thermal Processing and Land Disposal of Solid Waste—Guidelines,* U. S. Environmental Protection Agency, 39 Fed. Reg. 29334 (Aug. 14, 1974).

6. *Decision-Makers Guide in Solid Waste Management, at* 109 Office of Solid Waste Maagement Programs, U. S. Environmental Protection Agency (1976).

7. P. Vardy, "Land Disposal: 1975 to 1990—A Look Ahead at Changes in Technology, Gas and Leachate Controls and End Use Application", at 34, contained in *Compilation of Papers From Third National Congress: Waste Management Technology and Resource Recovery, National Solid Wastes Management Association* (1975).

8. See, *e.g., The Environmental Management of Leachate,* NSWMA Technical Bulletin (Oct. 1974), at 1 ("The application of sound and rigid engineering principles and construction practices

illustrates, however, is that Appellees have tried to circumvent the consensus of informed private and governmental opinion on the relationship of sanitary landfills to the environment.

Congress has acted to promote the protection of health and the environment by "prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health". 42 *U. S. C.* § 6902(3); see also 42 *U. S. C.* § 6945. That being the case, there is no reasonable basis for New Jersey to prohibit the disposal therein of solid or liquid waste which originates outside the state.

B. *P. L.* 1973, *c.* 363 Prohibits the Entry Into New Jersey of Solid Waste for Purposes of Resource Recovery and Energy Conservation.

The Resource Conservation and Recovery Act of 1976 contains a Congressional finding that usable materials and energy[9] may be recovered from solid waste. Since "the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments", 42

8. (Cont'd.)
continues to demonstrate that sanitary landfilling is not only an acceptable and economic method of solid wastes disposal, but also an excellent way to convert unused, unsuitable, or marginally acceptable land into valuable real estate for a variety of community end uses."); Weddle and Garland, "Dumps: A Potential Threat to Our Groundwater Supplies", *Nation's Cities* at 24 (Oct. 1974) ("[S]anitary landfilling [is] the only proven, environmentally acceptable method of final disposal available."); Garland and Mosher, "Leachate Effects of Improper Land Disposal", *Waste Age* (March 1975).

9. It is undisputed that methane gas recovered at sanitary landfills may be processed into natural gas and fed into the commercial gas system (A277). Thus, sanitary landfills themselves may provide a source of energy.

U. S. C. 6901(c)(3), recovered material must have a very considerable value.

In their briefs and at oral argument, Appellants stressed that usable materials and energy are excluded from New Jersey by *P. L.* 1973, *c.* 363. They identified automobile hulks as one of the many examples of solid waste subject to the ban. Appellees disagreed, pointing to the emergency rule, *N. J. A. C.* 7:1-4, adopted by the Department of Environmental Protection (A92).

All parties implicitly agree that automobile hulks may be processed and valuable usable materials recovered therefrom. It is also common knowledge, and this Court may take judicial notice, that such hulks contain steel, aluminum, copper, cloth, glass, plastic, tin, rubber, cardboard, and other similar substances too numerous to mention.

An automobile hulk cannot be defined as "separated waste material" (A96) within the meaning of *N. J. A. C.* 7:1-4.2(b), or "municipal solid waste" (A96) as contemplated by *N. J. A. C.* 7:1-4.2(c). Therefore, automobile hulks are plainly still subject to the entry ban.

A second, and far broader, example of excluded recoverable waste is illustrated in *N. J. A. C.* 7:1-4.2(c), which permits importation of only:

> "Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials."

If municipal solid waste has value as a potential source of fuel or other usable secondary materials, then so must commercial, industrial and agricultural waste. But these

latter wastes remain subject to the entry ban, except to the limited extent that they fall into another excepted category (A96).[10]

One objective of the Resource Conservation and Recovery Act of 1976 is the establishment of ". . . a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste." 42 *U. S. C.* § 6902(8). That objective cannot be achieved if states remain free to adopt exclusionary legislation.

C. A Statute Which Prohibits the Entry or Disposal in One State of Solid Waste Which Originates in Another State Conflicts With the Resource Conservation and Recovery Act of 1976, or Plainly and Palpably Infringes Its Policy.

In adopting the Resource Conservation and Recovery Act of 1976, Congress recognized that contiguous areas in adjoining states may "have common solid waste management problems and are appropriate units for planning regional solid waste management services". 42 *U. S. C.* § 6942(a). A mechanism was established to facilitate the development of regional solid waste management plans for such areas.

Once identified by the Administrator of the U. S. Environmental Protection Agency, the Governors of the respective states are required to fix the boundaries of each interstate area and to establish or designate a body to

10. A state or regional solid waste plan adopted pursuant to the applicable provisions of the Resource Conservation and Recovery Act of 1976 ". . . shall provide that no local government within the State shall be prohibited under State or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities". 42 *U. S. C.* 6943(5). By its specific terms, *P. L.* 1973, *c.* 363, would frustrate this policy by preventing the acquisition of solid waste which originated in another state.

develop a regional plan therefor, 42 *U. S. C.* § 6946(c)(1) and (2). The Governors have no discretion in the matter. Congress has mandated that they "shall" take the designated action.

State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states prohibit the entry of solid waste originating in other states.

In *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 766 (1945), this Court held:

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless . . . the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

Since solid and liquid waste can be disposed of without posing a danger to the environment or to health, a state statute which indiscriminately bans the entry of solid and liquid waste unquestionably stands as an obstacle to the accomplishment of national policy, and should be struck down.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief and Reply Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) that the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

We hereby certify that on this 6th day of December, 1976, three copies of the Supplemental Brief of Appellants were mailed, with adequate first class postage prepaid: to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae,* National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006; to Louis L. Meier Jr., attorney for *amicus curiae,* American Society of Civil Engineers, at his law office located at 1625 Eye Street, N.W., Washington, D. C. 20006; to David H. Souter, Attorney General, attorney for the State of New Hampshire, *amicus curiae,* at his office located in the State House Annex, Concord, New Hampshire 03301; and to M. Jerome Diamond, Attorney General, attorney for the State of Vermont, *amicus curiae,* at his office located in the Pavilion Office Building, Montpelier, Vermont, 05602.

We further certify that all parties required to be served have been served.

By _____
Herbert F. Moore

By _____
Arthur Meisel